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Foreign Sovereign Immunities Act of 1976: Direct Effects and Minimum Contacts

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NOTES

THE FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976: DIRECT EFFECTS AND MINIMUM CONTACTS

The "direct effects" test of the commercial activities exception to the Foreign Sovereign Immunities Act of 1976 (FSIA)[1] provides for jurisdiction over any foreign sovereign whose act or omission outside the United States causes a direct effect within the United States, if that act or omission is connected with a commercial activity.[2] Congress left the development of a workable direct-effects test, however, to the judiciary.[3] In developing such a test, courts have had difficulty balancing the need for redressing the injuries of their own residents against the impropriety of unilaterally setting the terms by which foreign sovereigns may conduct business in their own countries.[4]

This Note explores the development of a direct-effects test from two perspectives. First, it examines the legislative history to determine the most plausible statutory interpretation.[5] Second, it examines that interpretation in light of the constitutional requirements of due process enunciated most recently by the Supreme Court in *World-Wide Volkswagen Corp. v. Woodson*.[6] There, the Court refined the "minimum contacts" requirement in the context of a state long-arm statute with a jurisdictional reach similar to that of the direct-effects test.[7] This Note concludes that the most plausible statutory interpretation of the direct-effects test is inconsistent with the due process requirements set forth in *World-Wide Volkswagen*.[8]

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1. Foreign Sovereign Immunities Act of 1976, Pub. L. 94-583, 90 Stat. 2891 (codified in scattered sections of 28 U.S.C.).

2. 28 U.S.C. § 1605(a)(2) (1976). *See* text accompanying notes 22-23 *infra*.

3. *See* notes 25-26 *infra* and accompanying text. *Cf.* Harris v. VAO Intourist, Moscow, 481 F. Supp. 1056, 1066 (E.D.N.Y. 1979), where the court correctly noted that "[t]he sensitive and difficult problems presented by possible conflicts between private rights and international comity are, under our Constitution, peculiarly fitted for executive and legislative resolution."

4. *See* notes 71-78 *infra* and accompanying text. *See also* Note, *Sovereign Immunity*, 18 HARV. INT'L L.J. 429, 439 n.48 (1977).

5. *See generally* notes 9-64 *infra* and accompanying text.

6. 444 U.S. 286 (1980).

7. *See* notes 83-91 *infra* and accompanying text.

8. *See* notes 92-99 *infra* and accompanying text.

I

THE FOREIGN SOVEREIGN IMMUNITIES ACT

The FSIA clarifies the occasions and procedures by which plaintiffs may sue foreign states, their agents or instrumentalities[9] in U.S. courts. The Act codifies the "restrictive" theory of the international law principle of sovereign immunity. It therefore limits immunity to suits involving a foreign state's public acts; immunity does not extend to suits based on the sovereign's private or commercial acts.[10] Unlike the restrictive theory of sovereign immunity, how-

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9. 28 U.S.C. § 1603 (1976) provides:

(a) A "foreign state" . . . includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States . . . nor created under the laws of any third country.

. . . .

See, e.g., Carey v. National Oil Corp., 592 F.2d 673, 676 n.1 (2d Cir. 1979) (corporation created and wholly owned by the Libyan government was a "foreign state"); Yessenin-Volpin v. Novosti Press Agency, Tass, 443 F. Supp. 849, 852-54 (S.D.N.Y. 1978) (press agency 63% owned by Soviet state held to be a "foreign state," partly on the basis of the "essentially public nature" of such organizations in the U.S.S.R.); Edlow Int'l Co. v. Nuklearna Elektrarna Krsko, 441 F. Supp. 827, 831-32 (D.D.C. 1977) (Yugoslavian nuclear power plant operated by workers' organization held not an "agency or instrumentality of a foreign state").

10. *See* H.R. REP. NO. 1487, 94th Cong., 2d Sess. 7 (1976) [hereinafter cited as HOUSE REPORT], *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 6604, 6605. The House and Senate Judiciary Committees adopted identical reports, with different paginations. *See* S. REP. NO. 1310, 94th Cong., 2d Sess. (1976). All future references will be to the *House Report*.

Prior to 1952, the State Department adhered to the "absolute" theory of sovereign immunity. Under this theory, a foreign state or its instrumentality was immune from suit in the United States, whether or not the lawsuit involved the public or private acts of the state. *See Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary,* 94th Cong., 2d Sess. 93 (testimony of Michael Marks Cohen) [hereinafter cited as *House Hearings*].

The State Department shifted its position in 1952 when it officially adopted the "restrictive" theory of sovereign immunity. *See* Letter from Acting Legal Advisor to the State Department Jack B. Tate to Acting Attorney General Philip B. Perlman (May 19, 1952), *reprinted in* 26 DEP'T OF STATE BULL. 984 (1952) [hereinafter cited as Tate Letter]. This policy recognizes the absolute immunity of a foreign nation or its instrumentality with respect to its "public" or "governmental" acts. Immunity is denied, however, in suits involving the state's "private" or "commercial" acts. Thus, a foreign nation would not usually be sheltered from litigation over ordinary business transactions in the forum state.

The realization that a substantial majority of nations of the world adopted the restrictive approach spurred this change in policy. The United States did not receive a quid pro quo when it was sued in most foreign countries. "It is thus evident that with the possible exception of the United Kingdom little support has been found except on the part of the Soviet Union and its satellites for continued full acceptance of the absolute theory of

ever, the FSIA does not require the court to determine the *purpose* of the foreign state's activity, but rather the *nature* of that activity.[11]

The FSIA transfers sovereign immunity determinations from the executive branch to the judiciary, thereby eliminating the State Department's political discretion in settling immunity pleas,[12] and

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sovereign immunity." Tate Letter, *supra,* at 985. *See also* J. SWEENEY, THE INTERNATIONAL LAW OF SOVEREIGN IMMUNITY 21 (1963). Not only did this shift bring U.S. policy into line with the rest of the world, but because of the expansion of international trade, it provided a greater degree of protection and security for significantly greater numbers of American citizens requiring adjudication of claims arising out of their contacts with foreign states. Tate Lettter, *supra,* at 985.

The Supreme Court upheld the restrictive theory ("act of state" doctrine) in Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976). The Court held that the defendant failed to establish an act of state because it did not show that Cuba's repudiation of a debt was "invested with sovereign authority," rather than merely "arising from the operation of [a] commercial enterprise." *Id.* at 692-95. *See also* Hunt v. Mobil Oil Corp., 550 F.2d 68, 73 (2d Cir.), *cert. denied,* 434 U.S. 984 (1977) (Libya's seizure of property owned by independent oil producer held to be "non-commercial sovereign activity.").

11. 28 U.S.C. § 1603(d) (1976) provides:

> A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. *The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.*

(emphasis added). *See* National Am. Corp. v. Federal Republic of Nigeria, 448 F. Supp. 622 (S.D.N.Y. 1978), *aff'd on other grounds,* 597 F.2d 314 (2d Cir. 1979). In that case, a foreign sovereign sought immunity on grounds that cement it ordered under a disputed contract was intended for military purposes. The court held that since the purpose for which a foreign government purchases goods is irrelevant under the FSIA, the defendant's sovereign immunity defense must fail. *Id.* at 641-42. *See also* Yessenin-Volpin v. Novosti Press Agency, Tass, 443 F. Supp. 849 (S.D.N.Y. 1978), where the court noted that a given entity may at times engage in commercial activity, which is not immune, while at other times perform essentially governmental actions and thus be protected by sovereign immunity. The court held that certain allegedly libelous articles were the result of the TASS agency's essentially governmental activity, since the articles were jointly written by TASS and certain other agencies of the Russian government, and since the articles were commentaries on the Soviet government. *Id.* at 855-57.

12. Although the State Department adopted the restrictive theory as a matter of policy, it retained great discretion. If the executive branch felt that a particular grant of sovereign immunity would be advantageous for foreign policy or general diplomatic relations, the State Department remained free to file a "suggestion of immunity" with the court, whether or not the action related to the defendant's public or private acts. *See* HOUSE REPORT, *supra* note 10, at 7, 8, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS, at 6606, 6607. *See also House Hearings, supra* note 10, at 63-64. The Department infrequently exercised such discretion, yet situations arose where this flexibility proved particulary useful. Michael H. Cardozo related one such instance in his testimony before the House Subcommittee:

> MR. KINDNESS. But your point is that the enactment of this bill into law would remove the flexibility so that an exception could no longer be made to a general policy?
>
> MR. CARDOZO. That's what worries me. I think that flexibility may be important in particular cases. The most interesting one in recent times, of course, was the case of the Eastern Airlines plane that was hijacked to Cuba just at the time that a Cuban vessel was being attached in this country.
>
> And when we approached the Cubans and said, "Surely, you're going to release that plane and its passengers immediately," they said, "Oh, of course, we

assuring that such determinations are made according to consistently applied legal principles.[13] The Act also provides a procedure for serving process on foreign states, eliminating the need to attach property to obtain jurisdiction.[14]

The FSIA creates a federal long-arm statute providing for both in personam and subject matter jurisdiction under certain specified circumstances.[15] 28 U.S.C. § 1330(b) provides for personal jurisdiction "as to every claim for relief over which the district courts have [subject matter] jurisdiction under subsection (a)."[16] Subsection 1330(a) grants subject matter jurisdiction over "any nonjury civil action against a foreign state . . . with respect to which the foreign state is not entitled to immunity . . . under sections 1605-1607."[17] Read together, subsections (a) and (b) indicate that a court has both subject matter and in personam jurisdiction in every case in which a foreign state is not entitled to immunity under sections 1605-1607.[18]

In other words, a district court has personal jurisdiction under section 1330(b) if it has subject matter jurisdiction under section 1330(a), which in turn requires the "minimum contacts" specified by the immunity provisions of sections 1605-1607.[19]

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will, just as soon as you release our ship." And the State Department very quickly sent a telegram to the judge in that case and said, "We suggest the immunity," although it was a commercial transaction. The ship was quickly released and the plane was released. That could be quite important.

House Hearings, supra note 10, at 65-66.

On the other hand, the executive branch often found itself in the uncomfortable position of "playing favorites" among foreign governments. This inconsistency and resulting diplomatic friction, as well as the administrative burden of making individual immunity determinations, led the State Department to support the bill that ultimately removed this discretion. *See House Hearings, supra* note 10, at 28-29 (testimony of Monroe Leigh, Legal Adviser, Dep't of State).

13. HOUSE REPORT, *supra* note 10, at 7-8, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS, at 6605-06.

14. 28 U.S.C. § 1608 (1976). *See* HOUSE REPORT, *supra* note 10, at 8, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS, at 6606. The Act limits the absolute immunity of foreign states to attachment of property to execute a judgment. 28 U.S.C. §§ 1609-1611 (1976).

15. *See* 28 U.S.C. § 1330 (1976).

16. *Id.* § 1330(b).

17. *Id.* § 1330(a). 28 U.S.C. §§ 1604-1607 (1976) confer blanket immunity upon foreign sovereigns, subject to certain exceptions relating to the commercial or private activities of the defendant. These exceptions coincide with the restrictive theory of sovereign immunity, discussed at note 10 *supra*.

18. The legislative history supports this interpretation of the relationship between section 1330 and sections 1605-1607. *See* HOUSE REPORT, *supra* note 10, at 13, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS, at 6612:

> Section 1330(b) provides, in effect, a Federal long-arm statute over foreign states. . . . For personal jurisdiction to exist under section 1330(b), the claim must first of all be one over which the district courts have original jurisdiction under section 1330(a), meaning a claim for which the foreign state is not entitled to immunity.

19. The *House Report* states:

II

FSIA IMMUNITY PROVISIONS: MINIMUM CONTACTS

Section 1604 provides that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter."[20] The exceptions to this grant of immunity in section 1605 are conditioned upon the defendant's commercial activity in or affecting the United States. Section 1605 provides, in pertinent part:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
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> . . . .
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state;[21] or upon an act performed in the

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> The requirements of minimum jurisdictional contacts and adequate notice are embodied in the provision. *Cf. International Shoe Co. v. Washington,* 326 U.S. 310 (1945), and *McGee v. International Life Insurance Co.,* 355 U.S. 220, 223 (1957). . . . Significantly, each of the immunity provisions in the bill, sections 1605-1607, requires some connection between the lawsuit and the United States, or an express or implied waiver by the foreign state of its immunity from jurisdiction. [*See* 28 U.S.C. § 1605(a)(1) (1976)] These immunity provisions, therefore, prescribe the necessary contacts which must exist before our courts can exercise personal jurisdiction.

HOUSE REPORT, *supra* note 10, at 13, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS, at 6612 (footnote added).

In Harris v. VAO Intourist, Moscow, 481 F. Supp. 1056, 1062 (E.D.N.Y. 1979), the court stated:

> [T]he Immunities Act incorporates in the same provisions answers to three issues: (1) when to grant immunity, i.e., making the distinction between commercial and governmental activity; (2) what is the basis for long-arm in personam jurisdiction (a question handled with great sophistication and specificity in the Uniform Interstate and International Procedure Act, various state statutes and in the District of Columbia statute); and (3) how great is the scope of subject matter jurisdiction. The effect of this construction is to conceal distinctions that need to be drawn in careful analysis.

The FSIA's application of the same criteria to determine both in personam and subject matter jurisdiction is unusual. A federal court typically obtains subject matter jurisdiction in two ways. Federal question jurisdiction exists if the cause of action arises under the Constitution, laws, or treaties of the United States. 28 U.S.C.A. § 1331 (West Supp. 1981). A federal court has diversity jurisdiction if the cause of action is between "(1) citizens of different States; (2) citizens of a State and citizens or subjects of a foreign state; [or] (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties," and if the amount in controversy exceeds $10,000. 28 U.S.C. § 1332 (1976). Personal jurisdiction, however, usually depends on distinct criteria and policies. *See* notes 71-75 *infra* and accompanying text. *See generally* 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1063, at 202-05 (1969). The FSIA collapses the distinction between subject matter and in personam jurisdiction in actions involving foreign sovereigns.

20. 28 U.S.C. § 1604 (1976).

21. "A commercial activity carried on in the United States by a foreign state means commercial activity carried on by such state and having *substantial contact with the United States.*" 28 U.S.C. § 1603(e) (1976) (emphasis added). Therefore, in order to be subject to jurisdiction under the first clause of § 1605(a)(2), the statute itself suggests that

> United States in connection with a commercial activity of the foreign state elsewhere; *or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.*[22]

The direct-effects exception has caused problems of interpretation; courts have had difficulty assessing the degree of "contacts" between the defendant and the forum necessary to confer jurisdiction over him.[23] The *House Report* indicates that courts should apply the direct-effects test in light of both the District of Columbia long-arm statute[24] and section 18 of the *Restatement (Second) of Foreign Relations Law of the United States*.[25] The remainder of this sec-

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the foreign sovereign must meet the due process requirements of minimum contacts. *See* East Europe Domestic Int'l Sales Corp. v. Terra, 467 F. Supp. 383, 387-88 (S.D.N.Y.), *aff'd mem.*, 610 F.2d 806 (2d Cir. 1979).

The first clause of § 1605(a)(2) closely resembles the "transaction of business" provisions of many state long-arm statutes. *See* notes 42-48 *infra* and accompanying text. It is not equivalent, however, to the less restrictive "doing business" provisions of some state long-arm statutes. *See* note 28 *infra*.

22. 28 U.S.C. § 1605 (1976) (emphasis and footnote added).

23. *See, e.g.*, Harris v. VAO Intourist, Moscow, 481 F. Supp. 1056 (E.D.N.Y. 1979); East Europe Domestic Int'l Sales Corp. v. Terra, 467 F. Supp. 383 (S.D.N.Y.), *aff'd mem.*, 610 F.2d 806 (2d Cir. 1979); Upton v. Empire of Iran, 459 F. Supp. 264 (D.D.C. 1978), *aff'd mem.*, 607 F.2d 494 (D.C. Cir. 1979).

The legislative history suggests that the third clause of § 1605(a)(2) should be read restrictively. In hearings held before the House Committee on the Judiciary, the Chief of the Foreign Litigation Section, Civil Division, of the Department of Justice "stressed that the long-arm feature of the bill will insure that only those disputes which have a relation to the United States are litigated in the courts of the United States, and that our courts are not turned into small 'international courts of claims.' " He maintained that Congress did not intend the FSIA to "open up our courts to all comers to litigate any dispute which any private party may have with a foreign state anywhere in the world." *House Hearings, supra* note 10, at 31 (testimony of Bruno A. Ristau). *See also* Note, *Sovereign Immunity*, 18 HARV. INT'L L.J. 429, 437-40 (1977) (arguing that the "effect" required by § 1605(a)(2) should be more significant than that required by the Commerce Clause of the U.S. Constitution).

24. *See* HOUSE REPORT, *supra* note 10, at 13, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS, at 6612 ("Section 1330(b) . . . is patterned after the long-arm statute Congress enacted for the District of Columbia."). As explained above, § 1330 relies directly on the immunity provisions of §§ 1605-1607 in order to determine jurisdiction. *See* notes 17-18 *supra* and accompanying text. The *House Report* states that section 1330 and section 1605 are "carefully interconnected." HOUSE REPORT, *supra* note 10, at 14, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS, at 6612. In Harris v. VAO Intourist, Moscow, 481 F. Supp. 1056, 1061 (E.D.N.Y. 1979), the court commented that "[i]n interpreting section 1605 . . . courts properly look to the interpretations given the District of Columbia long-arm provisions." *See also* Upton v. Empire of Iran, 459 F. Supp. 264, 266 (D.D.C. 1978), *aff'd mem.*, 607 F.2d 494 (D.C. Cir. 1979). In spite of such arguments, this Note maintains that Congress did *not* intend to incorporate the *specific* provisions of the District of Columbia long-arm statute into the FSIA. Rather, Congress only meant that in personam jurisdiction of district courts over foreign sovereigns requires that the sovereign have sufficient "minimum contacts" with the forum, a requirement common to the District of Columbia long-arm statute, the FSIA, and the due process clause of the U.S. Constitution. *See* notes 50-54 *infra* and accompanying text.

25. The *House Report* states that the direct-effects clause of § 1605(a)(2) is to be interpreted "consistent with principles set forth in section 18" of the RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (1965). HOUSE REPORT,

tion examines both of these interpretations of the direct-effects clause. As will be shown, the specific provisions of the District of Columbia long-arm statute are inapplicable to the direct-effects test.[26] The *Restatement* approach, on the other hand, provides a workable statutory construction consistent with the legislative history and the language of the statute.[27]

A. THE DISTRICT OF COLUMBIA LONG-ARM STATUTE

The District of Columbia long-arm statute confers in personam jurisdiction over a defendant based upon his "enduring relationship" with the forum or upon his conduct in relation to the forum.[28] Section 13-422 of the D.C. Code provides: "A District of Columbia court may exercise personal jurisdiction over a person domiciled in, organized under the laws of, or maintaining his or its principal place of business in, the District of Columbia as to *any claim for relief*."[29]

This section is inapplicable to the FSIA.[30] The FSIA does not provide that a U.S. court may exercise jurisdiction over a foreign sovereign merely because it has an "enduring relationship" with the forum state. The FSIA imposes at least two further requirements.

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supra note 10, at 19, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS, at 6618. *See* notes 55-64 *infra* and accompanying text. The fact that Congress *explicitly* stated that courts should interpret the direct-effects clause in light of the *Restatement*—as compared with Congress's reference to the D.C. Code in the context of the broad jurisdictional provision of § 1330(b)—makes it hard to understand why courts nevertheless rely on the much more tenuous reference to the District of Columbia long-arm statute, especially given the many difficulties involved in trying to use the specific provisions of that statute as a direct-effects test. *See, e.g.,* Harris v. VAO Intourist, Moscow, 481 F. Supp. 1056, 1061-62 (E.D.N.Y. 1979).

26. *See* notes 29-54 *infra* and accompanying text.

27. *See* notes 55-64 *infra* and accompanying text.

28. *See* D.C. CODE ANN. § 13-422 (1973) ("Personal jurisdiction based upon enduring relationship"); *id.* § 13-423 ("Personal jurisdiction based upon conduct"). These two sections are also codified in the UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT, §§ 1.02-1.03, 9B UNIFORM LAWS ANN. 307, 308-10 (1966).

Significantly, § 13-422 is more restrictive than the more liberal "doing business" long-arm provisions of many state statutes. Section 13-422 does not confer jurisdiction over a non-resident defendant simply because he is "doing business" in the forum. The defendant must also be domiciled in, organized under the laws of, or maintain his principal place of business in the forum. Compare the rule in New York, where courts generally approve personal jurisdiction if the out-of-state defendant has "engaged in such a continuous and systematic course of 'doing business' [in New York] as to warrant a finding of its 'presence' in this jurisdiction." Simonson v. International Bank, 14 N.Y.2d 281, 285, 200 N.E.2d 427, 429, 251 N.Y.S.2d 433, 436 (1964). *See also* Gelfand v. Tanner Motor Tours, Ltd., 339 F.2d 317 (2d Cir. 1964), *on remand,* 385 F.2d 116 (2d Cir. 1967); Frummer v. Hilton Hotels Int'l, Inc., 19 N.Y.2d 533, 227 N.E.2d 851, 281 N.Y.S.2d 41, *cert. denied,* 389 U.S. 923 (1967); Bryant v. Finnish Nat'l Airline, 15 N.Y.2d 426, 208 N.E.2d 439, 260 N.Y.S.2d 625 (1965); N.Y. CIV. PRAC. LAW § 301 (McKinney 1972).

29. D.C. CODE ANN. § 13-422 (1973) (emphasis added).

30. *Cf.* Harris v. VAO Intourist, Moscow, 481 F. Supp. 1056, 1060 (E.D.N.Y. 1979) ("[E]ven if the legislative history of the [FSIA] and its language were stretched to encompass" § 13-422, the defendants did not have such an "enduring relationship.").

First, the foreign sovereign must be involved in a "commercial activity."[31] Second, and more importantly, the specific activity that gives rise to the lawsuit must arise from the contacts specified in sections 1605-1607.[32] Since section 13-422 does not require a connection between the lawsuit and the "enduring relationship," Congress clearly did not intend this particular provision of the D.C. Code to apply to jurisdictional determinations under the FSIA.

The next section of the District of Columbia statute, section 13-423, provides for personal jurisdiction over a foreign defendant if the defendant has certain specified contacts with the forum.[33] Unlike section 13-422, section 13-423 requires a connection between the specific activity, or "contacts" described in clauses (1) to (6), and the "claim for relief."[34] Two clauses are superficially applicable to the direct-effects test: section 13-423(a)(4) ("tortious injury") and section 13-423(a)(1) ("transaction of business").[35]

Section 13-423(a)(4) provides for jurisdiction over a person who has caused tortious injury in the forum by an act or omission outside

31. 28 U.S.C. § 1605(a)(2) (1976), *quoted at* text accompanying notes 21-22 *supra*.

32. 28 U.S.C. § 1330(a), (b) (1976). *See* notes 15-20 *supra* and accompanying text.

33. D.C. CODE ANN. § 13-423 (1973) provides, in pertinent part:

> (a) A District of Columbia court may exercise personal jurisdiction over a person, who acts directly or by an agent, *as to a claim for relief arising from the person's—*
>
> (1) *transacting any business in the District of Columbia;*
>
> (2) contracting to supply services in the District of Columbia;
>
> (3) causing tortious injury in the District of Columbia by an act or omission in the District of Columbia;
>
> (4) *causing tortious injury in the District of Columbia by an act or omission outside the District of Columbia if he regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed, or services rendered, in the District of Columbia;*
>
> (5) having an interest in, using, or possessing real property in the District of Columbia; or
>
> (6) contracting to insure or act as surety for or on any person, property, or risk, contract, obligation, or agreement located, executed, or to be performed within the District of Columbia at the time of contracting, unless the parties otherwise provide in writing.

(emphasis added).

34. *Id.* § 13-423(a).

35. The other clauses of § 13-423(a) involve contacts predicated upon a defendant's conduct *in the forum.* Thus, contracting to supply services in the forum (§ 13-423(a)(2)), committing a tortious act in the forum (§ 13-423(a)(3)), having an interest in, using, or possessing real property in the District of Columbia (§ 13-423(a)(5)) and contracting to insure any person, property, risk contract, obligation or agreement (§ 13-423(a)(6)) all involve an act or acts of the defendant that take place in the District of Columbia. These provisions are analogous to the first two clauses of § 1605(a)(2). *See* text accompanying notes 21-22 *supra*. Although the first clause of § 13-423(a) ("transaction of business") seemingly requires that the defendant's act take place in the forum state, courts have interpreted similar provisions in other states to include out-of-state acts that cause tortious injury in the state in cases where the defendant introduced a defective product into a chain of distribution if he could forsee its use in the forum. *See* notes 43-44 *infra* and accompanying text.

the forum and who has certain specified contacts with the forum in addition to the injury.[36] Of the six clauses of section 13-423, only the "tortious injury" clause specifically refers to acts or omissions outside the forum causing effects inside the forum. Therefore, this clause applies most directly to the direct-effects test of the FSIA.

There are two reasons, however, why the tortious injury provision is inapplicable to the direct-effects test. First, section 13-423(a)(4) is limited to torts,[37] whereas the direct-effects test applies to any commercial activity carried on by a foreign sovereign.[38] Second, although section 13-423(a)(4), like the direct-effects test, requires a connection between the claim for relief and the tortious injury, it also requires that the defendant have other contacts with the forum unrelated to the tortious act.[39] Indeed, a defendant who satisfies those requirements can be subjected to in personam jurisdiction for *any* tortious injury he causes in the forum, regardless of whether that injury arises out of those particular "contacts." Nevertheless, the tort giving rise to the claim, without more, could never satisfy the test of section 13-423(a)(4), because the District of Columbia provision specifically requires that the *defendant* have some continuing contact with the forum, other than causing the injury there.[40] The direct-effects test of the FSIA, on the other hand, only requires that the *act itself* have a direct effect within the forum state. This test, unlike section 13-423(a)(4) of the D.C. Code, does not require the court to analyze the *defendant's other contacts* with the forum in order to determine whether *the tortious act* has a direct effect on the

36. The statute requires, in addition to the tortious injury, that the person "regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed, or services rendered, in the District of Columbia." D.C. CODE ANN. § 13-423(a)(4) (1973). Thus, the statute is more restrictive than the Illinois tortious injury provision, as interpreted by the Illinois Supreme Court in Gray v. American Radiator & Standard Sanitary Corp., 22 Ill.2d 432, 176 N.E.2d 761 (1961). The Illinois statute was the progenitor of this type of long-arm provision. *See generally* Annot., 24 A.L.R.3d 532, 563-67 (1969); 9B UNIFORM LAWS ANN. 310, 312 (1966); Margoles v. Johns, 483 F.2d 1213, 1216 (D.D.C. 1973).

37. D.C. CODE ANN. § 13-423(a)(4) (1973). *See* note 33 *supra*.

38. *See* Harris v. VAO Intourist, Moscow, 481 F. Supp. 1056 (E.D.N.Y. 1979). The court noted that whereas the District of Columbia long-arm statute "make[s] distinctions based on traditional classifications of causes of action such as 'commercial'—e.g., contract—and 'tort'—e.g., negligence, products liability and libel," the FSIA distinguishes between " 'governmental' and 'commercial' activity." *Id.* at 1063.

39. *See* note 36 *supra*.

40. In Harris v. VAO Intourist, Moscow, 481 F. Supp. 1056 (E.D.N.Y. 1979), the plaintiff brought a wrongful death action against the Union of Soviet Socialist Republics, among others, for the death of an American tourist in a Moscow hotel fire. The court held that it lacked personal jurisdiction over the defendants. The court based its decision, in part, upon the tortious injury provision of the District of Columbia long-arm statute. "[C]ourts in . . . the District of Columbia have rejected jurisdiction when the only contact in the forum is an injurious consequence of an out-of-state act or omission." *Id.* at 1064.

forum state. This fundamentally different focus strongly suggests that the tortious injury provision of the District of Columbia long-arm statute is unsuited as a direct-effects test within the meaning of section 1605(a)(2).[41]

The "transaction of business" provision of section 13-423 is the other clause at least superficially applicable to the direct-effects test.[42] Section 13-423(a)(1) confers in personam jurisdiction if two conditions are met. First, the defendant must have transacted business *in the forum state.* Second, the cause of action must arise from that transaction of business.

Several courts in other jurisdictions have interpreted similar "transacting business" tests in products liability cases to include *out-of-state acts* that cause effects within the forum if the defendant could foresee that his product would be marketed or used within the forum.[43] In such cases, the defendant usually meets the foreseeability condition by placing his goods in a distribution chain or "stream of commerce" that includes the forum state. This analysis closely parallels the direct-effects test of the FSIA. First, the claim for relief must arise from the defendant's contact with the jurisdiction, *i.e.,* the marketing of his products within the forum. Second, this interpretation of "transaction of business" is wide enough to include a defendant's out-of-state act that causes effects within the jurisdiction. The defendant's act of placing his product in the stream of commerce when he could have foreseen that it would be used or marketed within the jurisdiction establishes the nexus between the out-of-state act and its effect.[44] Although such a case has not arisen in the District of Columbia, it is possible that the D.C. long-arm statute could be similarly interpreted.

The "transaction of business" provision of the District of Columbia statute, however, is either limited to cases where the defendant's action allegedly takes place in the District of Colum-

41. The district court in Harris v. VAO Intourist, Moscow, 481 F. Supp. 1056 (E.D.N.Y. 1979), *see* note 40 *supra,* failed to recognize that the FSIA does *not* require any contact in addition to the "direct effect" of the defendant's act; the D.C. statute *does* require such additional contacts. The *Harris* court's mistaken reliance on the tortious injury provision of the D.C. statute reflected its failure to recognize this fundamental distinction.

42. D.C. CODE ANN. § 13-423(a)(1) (1973), *quoted at* note 33 *supra.*

43. *See, e.g.,* Connelly v. Uniroyal, Inc., 75 Ill.2d 393, 404-06 (1979), *cert. denied,* 444 U.S. 1060 (1980); Buckeye Boiler Co. v. Superior Ct. of Los Angeles Cty., 71 Cal.2d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1969). Exclusive reliance on the defendant's ability to foresee that his product will be used or marketed in a forum is no longer sufficient for personal jurisdiction under the due process clause. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295 (1980). *See generally* notes 66-93 *infra* and accompanying text.

44. For a discussion of whether such a foreseeability test meets the constitutional requirements of due process, see notes 65-94 *infra* and accompanying text.

bia,[45] or to products liabilities cases involving well-established chains of distribution.[46] While the foregoing analysis is one possible approach to the direct-effects test, it is applicable only to the activities of foreign sovereigns involving the marketing of manufactured products. The FSIA, however, is not principally designed to cover such activity.[47] Indeed, the direct-effects test encompasses *all* commercial activities, not just those activities giving rise to products liability claims. The "transaction of business" clause of the District of Columbia long-arm statute is thus of little use in the majority of direct-effects cases.[48]

Since the "tortious injury" provision fails to emphasize the connection between the lawsuit and the forum in establishing the "minimum contacts" necessary for in personam jurisdiction,[49] and since courts usually apply the "transaction of business" provision to out-of-state acts that are part of mass marketing chains,[50] Congress probably did not intend that the *specific* provisions of section 13-423 be incorporated into the FSIA.

In addition, it is not clear from the legislative history that Congress intended to transfer wholesale the specific provisions of the District of Columbia statute to the international arena. For example, the *House Report* states that "[s]ection 1330(b) provides, in effect, a Federal long-arm statute over foreign states. . . . It is *patterned after* the long-arm statute Congress enacted for the District of Columbia. . . . The requirements of minimum jurisdictional contacts and adequate notice are embodied in the provision."[51] The verb "patterned" coupled with the subsequent reference to "require-

45. *See, e.g.,* Security Bank, N.A. v. Tauber, 347 F. Supp. 511, 515 (D.D.C. 1972); Environmental Research Int'l, Inc. v. Lockwood Greene Engineers, Inc., 355 A.2d 808, 810 (U.S. App. D.C. 1976).

46. *See* notes 43-44 *supra* and accompanying text.

47. The *House Report* cited the following examples of the types of problems the FSIA was enacted to cover:

> Instances of such contact occur when U.S. businessmen sell goods to a foreign state trading company, and disputes may arise concerning the purchase price. Another is when an American property owner agrees to sell land to a real estate investor that turns out to be a foreign government entity and conditions in the contract of sale may become a subject of contention. Still another example occurs when a citizen crossing the street may be struck by an automobile owned by a foreign embassy.

HOUSE REPORT, *supra* note 10, at 6-7, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS, at 6605.

48. Even if the "transaction of business" clause of the D.C. statute applies to cases arising under the FSIA, it still suffers from the same constitutional infirmities described below in connection with § 18 of the *Restatement. See* notes 55-64 *infra* and accompanying text.

49. *See* notes 40-41 *supra* and accompanying text.

50. *See* note 43 *supra* and accompanying text.

51. HOUSE REPORT, *supra* note 10, at 13, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS, at 6612 (emphasis added).

ments of minimum . . . contacts" indicates that Congress may have intended the two statutes to be related only insofar as they both set requirements of minimum contacts. The specific tests, however, are not necessarily the same.[52]

At best, Congress's intent is unclear. Given the fundamental difference in approach between the two statutes,[53] and the ambiguous language of the *House Report,* Congress probably did not intend the specific provisions of the District of Columbia statute to be applied to cases involving international long-arm jurisdiction.[54]

B. THE RESTATEMENT

The *House Report* asserts that the direct-effects test of section 1605(a)(2) is to be interpreted consistently with the principles set forth in section 18 of the *Restatement (Second) of Foreign Relations Law of the United States*.[55] Section 18 provides:

> A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if either
>
> (a) the conduct and its effect are generally recognized as constituent elements of a crime or tort under the law of states that have reasonably developed legal systems, or
>
> (b) (i) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and (iv) the rule is not inconsistent with the principles of jus-

52. This suggestion is confirmed later in the paragraph. "[E]ach of the immunity provisions in the bill, sections 1605-1607, requires some connection between the lawsuit and the United States." *Id.* Thus, although the D.C. statute and the FSIA both set requirements of minimum contacts, Congress may have intended that the particular contacts required by the FSIA are to be determined by another source.

53. *See* notes 38-41 *supra* and accompanying text.

54. The entire problem of reconciling the D.C. statute and the FSIA is avoided, of course, if the D.C. long-arm statute *as a whole* is read to merely prescribe the requirements of due process. In such a case, a court would ignore any statutory interpretation and simply determine whether the exercise of jurisdiction over a particular defendant in a particular case is constitutional. *See* Environmental Research Int'l, Inc. v. Lockwood Greene Engineers, Inc., 355 A.2d 808, 810-11 (U.S. App. D.C. 1976), where the court stated that the D.C. long-arm statute permits "the exercise of personal jurisdiction over nonresident defendants to the extent permitted by the due process clause of the United States Constitution." This interpretation renders the specific provisions of the statute itself superfluous. It is dubious whether Congress intended the FSIA to be so unrestricted in its potential reach. Indeed, if Congress had intended the FSIA's personal jurisdiction provisions to be as wide as the due process clause authorizes, there would have been no need to refer to either the D.C. statute or the *Restatement* as guidelines.

55. HOUSE REPORT, *supra* note 10, at 19, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS, at 6618. This much more concrete and specific legislative interpretation supports the proposition advanced above that Congress did not intend the District of Columbia long-arm statute to determine the sufficiency of the contacts necessary for personal jurisdiction under the FSIA. *See* note 25 *supra.*

> tice generally recognized by states that have reasonably developed legal systems.[56]

Section 18 specifies the circumstances under which the United States may "prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory."[57] It is not a test for in personam jurisdiction. Section 18 defines a legislative rather than judicial power.[58]

Section 18 distinguishes between generally recognized torts or crimes and all other acts. If the conduct is a constituent element of a generally recognized crime or tort, the state need only establish "that the act outside the territory, and the effect within, [are also] constituent elements of such a crime or tort."[59] On the other hand, if the conduct is not a generally recognized crime or tort, the state must show "more than a mere causal relationship: the effect within the territory must be substantial and occur as a direct and foreseeable result of the conduct outside the territory."[60]

In the context of actions other than "crimes or torts," section 18 principally addresses the issue of foreseeability. Thus, the *Restatement* test requires a much closer nexus of foreseeability between the conduct and its effect when the conduct is not a crime or tort. This rule "will usually deal with conduct which was intended to produce the effect within the territory in the sense that those responsible for the conduct *had reason to foresee that the effect within the territory would result from the conduct outside.*"[61]

One reason for requiring a greater nexus of foreseeability for conduct not generally recognized as criminal or tortious is that the defendant's ability to foresee the effect of his criminal or tortious activity in the forum state can be inferred from the nature of the crime or tort itself.[62] In such a case, the only issue is whether the conduct and its effect are constituent elements of the crime or tort.[63]

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56. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 (1965) [hereinafter cited as RESTATEMENT].

57. *Id.*

58. *Id.*

59. *Id.* Comment e.

60. *Id.* Comment f. It is relevant that many of the examples cited by the draftsmen for acts that are *not* constituent elements of generally recognized crimes or torts are ones that involve economic matters, such as actions in one country that lead to a decrease in exports from another (no jurisdiction), or actions in one country that cause an effect in another that violates the second country's antitrust laws (jurisdiction). *See id.,* Comments f-g, Illustrations 8-10.

61. RESTATEMENT, *supra* note 56, § 18, Comment f (emphasis added).

62. Another equally important reason for not requiring as great a nexus between the defendant's out-of-forum act and its effect in cases involving generally recognized crimes or torts is the greater interest of the forum state in affording its residents adequate relief in such cases.

63. *But see* Harris v. VAO Intourist, Moscow, 481 F. Supp. 1056, 1063 (E.D.N.Y. 1979), where the court collapsed this distinction and applied the more restrictive foresee-

The court will presume that the defendant intended the foreseeable consequences of his tortious or criminal activity.[64]

Section 18 of the *Restatement* provides a workable standard for the direct-effects test. In many cases brought under the FSIA, however, application of section 18 will provide in personam jurisdiction if the effect in the forum of the defendant's conduct outside the forum is foreseeable. The next section explores the issue of whether this foreseeability test meets the constitutional requirements of due process.

III

CONSTITUTIONAL DUE PROCESS

The due process clause of the 14th Amendment requires that the defendant receive adequate notice of the suit against him[65] and be subject to the personal jurisdiction of the court.[66] Originally, in personam jurisdiction depended upon a court's "de facto power over the defendant's person,"[67] which in turn depended upon his physical presence in the jurisdiction. The physical-presence standard gave way, however, as the Supreme Court "accepted and then abandoned 'consent,' 'doing business,' and 'presence' " as bases for jurisdiction.[68] Finally, in *International Shoe Co. v. Washington,*[69] the Court held that "due process requires only that in order to subject a defendant to a judgment *in personam,* . . . he have certain minimum contacts with [the forum] such that the . . . suit does not offend 'traditional notions of fair play and substantial justice.' "[70]

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ability test of § 18(b) to the tort of negligence. It justified this interpretation solely on the basis of Congress's use of the phrase "*direct* effects" in § 1605(a)(2). The court's analysis is somewhat mystifying in light of § 18's unambiguous distinction between generally recognized torts or crimes and other acts. The *Harris* court begs the question when it states that Congress's use of "direct" brings such cases within § 18(b) rather than § 18(a). The principles of § 18 as a whole determine whether the greater or lesser restrictions shall apply, not a tenuous interpretation of the word "direct."

64. Other sections of the *Restatement* similarly limit a government's power to prescribe rules governing the out-of-state actions of non-residents. Section 30(2), for example, provides that "[a] state does not have jurisdiction to prescribe a rule of law attaching legal consequences to conduct of an alien outside its territory merely on the ground that the conduct affects one of its nationals." RESTATEMENT, *supra* note 56, § 30(2). This section precludes jurisdiction over aliens who injure nationals outside the territory merely because the national returns and suffers tortious effects within the territory. This requirement, like § 18, can be analyzed in terms of the reasonable foreseeability that the effect of the defendant's out-of-state act will be felt in the forum state.

65. Mullane v. Central Hanover Trust Co., 339 U.S. 306, 313-14 (1950). This requirement is satisfied by § 1608 of the FSIA, 28 U.S.C. § 1608 (1976).

66. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

67. *Id.*

68. McGee v. International Life Ins. Co., 355 U.S. 220, 222 (1957).

69. 326 U.S. 310 (1945).

70. *Id.* at 316.

The minimum contacts requirement has traditionally been seen to serve two functions: "It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system."[71] While these two functions traditionally arise in the context of limiting the jurisdiction of the state courts, they apply equally to problems of international long-arm jurisdiction. Indeed, the policy of protecting the defendant from the inconvenience of litigating in a distant forum is more applicable in the international context.

In determining the "fairness" or "reasonableness" of subjecting a defendant to the jurisdiction of an inconvenient forum, the court must balance several competing interests: first, the forum state's interest in resolving the dispute;[72] second, the plaintiff's interest in choosing his own forum;[73] third, the court's interest in efficiently resolving controversies;[74] and fourth, the state's interest in furthering substantive social policies.[75]

These interests also apply to the question of international long-arm jurisdiction. American citizens have increasingly greater contacts with foreign sovereigns.[76] Although the burdens involved in litigating in a distant forum are greater in the international context, courts must weigh such difficulties in light of the increased commercial interaction between U.S. citizens and foreign sovereigns, as well as the increased ease and convenience of long distance travel and communication.[77] An additional factor not present in the domestic sphere is that in balancing the foreign sovereign's inconvenience against the fairness to U.S. citizens in providing a forum for their grievances, the courts should consider that immunity pleas of the U.S. government are routinely ignored in foreign jurisdictions.[78] Although the difficulties of working with and understanding a sometimes unfamiliar legal system compound the defendant's problem of litigating in a foreign jurisdiction, the sovereign immunity practice of other nations is an important factor in resolving the issue of fair-

71. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980).
72. *See* McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957).
73. *See* Kulko v. Superior Ct. of California, 436 U.S. 84, 92 (1978).
74. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980).
75. Kulko v. Superior Ct. of California, 436 U.S. 84, 93, 98 (1978).
76. *See* HOUSE REPORT, *supra* note 10, at 6, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS, at 6605.
77. *See* note 80 *infra* and accompanying text.
78. HOUSE REPORT, *supra* note 10, at 9, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS, at 6607.

ness to the parties.[79]

The second function traditionally served by the "minimum contacts" requirement is to insure that the states do not reach beyond their powers as coequal sovereigns in the federal system. This function also applies in the international sphere. The concept of "sovereignty" suggests that foreign nations shall not be subject to the jurisdiction of the United States. U.S. courts are therefore constrained to treat foreign nations with the same (or greater) degree of deference as are the fifty states with respect to each other.

Courts have substantially relaxed the test for in personam jurisdiction since *International Shoe*. This trend reflects the increasingly interstate character of business transactions coupled with the greater ease of transportation and communication across state lines.[80] Nevertheless, as the Supreme Court stated in *Hanson v. Denckla,*[81]

> [I]t is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States.[82]

Such considerations of territorial limitations apply with even greater force in the international arena.

In *World-Wide Volkswagen Corp. v. Woodson,*[83] the Court reiterated that the "minimum contacts" requirement cannot be eroded simply because of the increased ease with which a defendant can defend himself in any forum. In that case, the plaintiff sought jurisdiction in Oklahoma over both the New York dealer and New York distributor of an automobile involved in an Oklahoma accident. The plaintiff argued that since the dealer and his distributor were

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79. Other jurisdictions are enacting their own foreign sovereign immunities acts. For example, the United Kingdom enacted such a statute in 1978. *See* State Immunity Act 1978, ch. 33, *reprinted in* 17 INT'L LEGAL MATERIALS 1123 (1978). Canada is also considering the enactment of sovereign immunity legislation. *See* Brower, Bistline & Loomis, *The Foreign Sovereign Immunities Act of 1976 in Practice,* 73 AM. J. INT'L L. 200, 210 n.66 (1979).

80. In McGee v. International Life Ins. Co., 355 U.S. 220 (1957), the Court stated:

> Looking back over this long history of litigation a trend is clearly discernible toward expanding the permissible scope of . . . jurisdiction over . . . nonresidents. In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.

Id. at 222-23.

81. 357 U.S. 235 (1958).

82. *Id.* at 251 (citations omitted).

83. 444 U.S. 286 (1980).

members of a nationwide chain of distribution, and since automobiles are necessarily mobile, the defendants could foresee that the car would be used in Oklahoma. The plaintiff, citing *Hanson v. Denckla,*[84] argued that when a defendant-seller can foresee that his product will be used in another forum, and the product is capable of causing injury in that forum, he has "purposefully avail[ed] [himself] of the privilege of conducting activities within [that] forum State,"[85] and is therefore subject to the jurisdiction of its courts.

In a 6-3 decision, the Court held that the defendants' ability to foresee *that the car would be used in Oklahoma* was insufficient to subject them to the jurisdiction of the Oklahoma court."[86] Before jurisdiction will lie, the Court required that the defendants have reason to foresee that they would be liable to suit in that state.[87]

> [T]he foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that *he should reasonably anticipate being haled into court there*. . . . The Due Process Clause . . . gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.[88]

The Court reasoned that if the plaintiff's argument prevailed, then a defendant's amenability to personal jurisdiction would travel wherever it was foreseeable that his product could be used.[89] Thus, the unilateral activity of a plaintiff would determine where the defendant could be sued. The Court rejected this conclusion in *Hanson v. Denckla,*[90] stating that the mere "unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State."[91]

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84. 357 U.S. 235 (1958).

85. *Id.* at 253.

86. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295 (1980). " '[F]oreseeability' alone has never been a sufficient benchmark for personal jurisdiction." *Id.*

87. *Id.* at 297.

88. *Id.* (emphasis added).

89. The Court noted that if the plaintiff's foreseeability argument was the criterion,

> [e]very seller of chattels would in effect appoint the chattel his agent for service of process. His amenability to suit would travel with the chattel. We recently abandoned the outworn rule of *Harris v. Balk,* 198 U.S. 215 (1905), that the interest of a creditor in a debt could be extinguished or otherwise affected by any State having transitory jurisdiction over the debtor. *Shaffer v. Heitner,* 433 U.S. 186 (1977). Having interred the mechanical rule that a creditor's amenability to a *quasi in rem* action travels with his debtor, we are unwilling to endorse an analogous principle in the present case.

Id. at 296.

90. 357 U.S. 235 (1953).

91. *Id.* at 253.

The Court's analysis of the element of foreseeability is relevant to the direct-effects clause of the FSIA. *World-Wide Volkswagen* suggests that the direct-effects test, as construed by section 18 of the *Restatement,* may result in constitutionally insufficient contacts between a foreign sovereign and the United States.

Section 18(a) permits jurisdiction over a defendant who causes an effect in the jurisdiction if both the act outside the jurisdiction as well as the effect within are elements of a generally recognized crime or tort. As previously discussed, at least one rationale for permitting jurisdiction under such circumstances is that a court will infer that a defendant who commits a generally recognized crime or tort has reason to foresee the natural consequences of his activity. The holding in *World-Wide Volkswagen,* however, prevents a court from exercising jurisdiction over a defendant merely because his out-of-state act causes tortious injury within the jurisdiction. Due Process now requires that a court look beyond the mere foreseeability of the defendant causing tortious injury and examine, in addition, the foreseeability of the defendant being haled into court. Although the defendants in *World-Wide Volkswagen* allegedly caused tortious injury in Oklahoma, and although the court inferred that by the nature of their business they could have foreseen causing such injury, the court would not infer that the defendants could anticipate being haled into court in that state. Although the commission of a tort is one factor that a court might consider in determining whether a defendant could foresee being subject to a forum's jurisdiction, it is not dispositive.

Section 18(b) of the *Restatement* is similarly deficient. The test set forth in that section permits jurisdiction if the defendant's out-of-state act causes a substantial, direct, and foreseeable effect in the forum jurisdiction.[92] *World-Wide Wolkswagen* applies even more forcefully here. Section 18(b) is concerned solely with whether the defendant can foresee his causing a direct and substantial effect in the forum jurisdiction. Unlike the Due Process requirement enunciated in *World-Wide Volkswagen,* it does not require that the defendant be able to reasonably foresee being haled into court in that forum. While a court would no doubt consider the foreseeability of the nexus between the defendant's act and its accompanying effect in determining whether the defendant could anticipate being subject to its jurisdiction, such an examination alone is far from dispositive.[93]

92. *See* notes 54-63 *supra* and accompanying text.

93. *Cf.* Carey v. National Oil Corp., 453 F. Supp. 1097 (S.D.N.Y. 1978), *aff'd,* 592 F.2d 673 (2d Cir. 1979):

> Even if, as plaintiffs allege, the Libyan government was aware that the Bahamian subsidiaries were being used merely as conduits to supply Nepco and its custom-

It is, of course, possible for a defendant to meet the tests set forth in section 18 and be constitutionally amenable to jurisdiction. If, for example, the defendant committed an egregious crime that caused an immediate and direct effect in the jurisdiction,[94] the court could infer the defendant's ability to foresee his being haled into court. Where courts are unwilling to make that inference, however, the direct-effects clause of the FSIA, as interpreted by section 18 of the *Restatement,* will authorize personal jurisdiction in contravention of the Due Process mandate of *World-Wide Volkswagen.*

CONCLUSION

Congress left the task of interpreting the direct-effects test to the courts. This Note reveals the substantial difficulties involved in developing a workable direct-effects test. Although Congress suggested that this test was to be "patterned" after the District of Columbia long-arm statute, no specific provision of that statute fits the direct-effects test. Additionally, although section 18 of the *Restatement* is a plausible test, it fails to meet due process requirements in its full range of application. Because the *Restatement* does not directly address the question of whether a defendant could anticipate being subject to the jurisdiction of a distant forum, it is constitutionally deficient as a test for in personam jurisdiction.

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ers, and even if—as seems likely—the 1974 embargo was designed to have a direct effect of a sort on the United States, *the effect in question* (deprivation of oil to Bahamian corporations) *is not one that creates the requisite minimum contacts. There has been absolutely no attempt by Libya or NOC to avail itself of any of the protections or privileges afforded by the United States*—rather, in fact, the reverse.

Id. at 1101 (emphasis added).

94. *See, e.g.,* RESTATEMENT *supra* note 55, § 18, Comment c, Illustration 2 (a nonresident commits homicide by shooting across the border). Of course, a foreign sovereign engaged in commercial activity is unlikely to commit such a clear-cut and egregious crime.